Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1219

In The

Supreme Court of the United States

October Term, 1990

FRED J. TOCCO,

Petitioner,

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING and TOWNSHIP OF CHERRY HILL,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT COUNCIL ON AFFORDABLE HOUSING

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Respondent, New Jersey Council on Affordable Housing
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 984-9664

MARY C. JACOBSON
Deputy Attorney General
Counsel of Record

TODD A. WIGDER
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment require the State of New Jersey to pay compensation to owners of land subject to a local development moratorium, which was of limited duration, provided for exemptions and was established for the public purpose of preserving scarce land resources during the time that the extent of the municipality's obligation under the State Constitution to provide lower income housing is subject to administrative review?

TABLE OF CONTENTS*

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF REASONS FOR DENYING THE PETITION 6

REASONS FOR DENYING THE PETITION 8

CONCLUSION 17

* The list of parties is omitted because the names of all parties appear in the caption. *Sup.Ct.R.* 14.1(b).

TABLE OF AUTHORITIES

Page

Cases Cited

Agins v. Tiburon, 447 *U.S.* 255 (1980) ..... *passim*

Andrus v. Allard, 444 *U.S.* 51 (1979) 13

Armstrong v. United States, 364 *U.S.* 40 (1960)..... 5

Berman v. Parker, 348 *U.S.* 26 (1954) 9

Danforth v. United States, 308 *U.S.* 271 (1939) 7, 10

First English Evan. Luth. Ch. v. Los Angeles Cty., 482 *U.S.* 304 (1987) 7, 13, 14

Goldblatt v. Hempstead, 369 *U.S.* 590 (1962)..... 12

Hills Dev. Co. v. Bernards Tp., 103 *N.J.* 1, 510 *A.*2d 621 (1986) 1, 2, 7, 9, 11

Holmdel Builders Ass'n v. Twp. of Holmdel, 121 *N.J.* 550, 583 *A.*2d 277 (1990)..... 5, 9, 15

Kaiser Aetna v. United States, 444 *U.S.* 164 (1979) 12

Kirby Forest Industries, Inc. v. United States, 467 *U.S.* 1 (1984) 6, 7, 11, 13

Littman v. Gimello, 115 *N.J.* 154, 557 *A.*2d 314, *cert.* denied ___ *U.S.* ___, 110 *S.Ct.* 324, 107 *L.Ed.*2d 314 (1989) 8

Lomarch v. Englewood, 51 *N.J.* 108, 237 *A.*2d 881 (1968) 15, 16

Nectow v. Cambridge, 327 *U.S.* 183 (1928) 6, 8

Nollan v. California Coastal Com'n, 483 *U.S.* 825 (1987) 15

Penn Central Transp. Co. v. New York City, 438 *U.S.* 104 (1978) 7, 8, 12, 13

TABLE OF AUTHORITIES – Continued

Page

So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 *N.J.* 158, 456 *A.*2d 390 (1983) 1, 5, 15

So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 *N.J.* 151, 336 *A.*2d 713, *cert.* denied 423 *U.S.* 808 (1975) 1, 7, 9, 15

United States v. Central Eureka Mining Co., 357 *U.S.* 155 (1958) 12

United States v. Riverside Bayview Homes, Inc., 474 *U.S.* 121 (1985) 6, 9

Williamson Cty. Regional Planning v. Hamilton Bank, 473 *U.S.* 172 (1985) 12

CONSTITUTIONS CITED

U.S. Const. amends. 5, 14 8

N.J. Const. (1947), art. I, ¶1 1

N.J. Const. (1947), art. I, ¶20 8

N.J. Const. (1947), art. IV, § 6, ¶2 1

STATUTES CITED

N.J.S.A. 52:27D-301 *et seq.* 1

N.J.S.A. 52:27D-303 1

N.J.S.A. 52:27D-309(a) 1, 2

N.J.S.A. 52:27D-313 2

N.J.S.A. 52:27D-314 3

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS CITED

N.J.A.C. 5:91-4.2 2

N.J.A.C. 5:91-11.1 2

RULES CITED

Sup.Ct.R. 10 8

Sup.Ct.R. 10.1(c) 15

Sup.Ct.R. 14.1(b) ii

Sup.Ct.R. 15.1 5

STATEMENT OF THE CASE

In two landmark decisions, the Supreme Court of New Jersey declared that each municipality in the State has a unique and important obligation under New Jersey's constitution to provide a realistic opportunity for its fair share of lower income housing. *N.J. Const.* (1947), art. I, ¶1; art. IV, § 6, ¶2. *So. Burl. City. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 *N.J.* 151, 174, 336 *A.*2d 713, *cert.* denied 423 *U.S.* 808 (1975) (*Mt. Laurel I*); *So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 *N.J.* 158, 208-09, 456 *A.*2d 390 (1983) (*Mt. Laurel II*). In response to the so-called *Mt. Laurel* decisions, the State Legislature enacted the Fair Housing Act (the Act), *N.J.S.A.* 52:27D-301 *et seq.*, to provide a comprehensive mechanism to address in an orderly and meaningful way the constitutional duty of all local communities. See *N.J.S.A.* 52:27D-303.

Among its many regulatory features, the Act created a State agency known as the Council on Affordable Housing (the Council) and gave it wide-ranging administrative powers to define regional needs throughout New Jersey for low and moderate income housing, to establish guidelines for municipalities to determine their fair share of the region's needs and to decide if proposed ordinances and related planning steps will satisfy local needs. *Hills Dev. Co. v. Bernards Tp.*, 103 *N.J.* 1, 21-23, 510 *A.*2d 621, 632-33 (1986) (*Hills Development*). Under the Act, a municipality is required to submit to the Council a "housing element," which is an analysis of the measures it plans to take to address its lower income housing obligation, and a "fair share plan," the township's proposed ordinances designed to actually carry out its planning steps. *N.J.S.A.*

52:27D-309(a); *N.J.A.C.* 5:91-4.2. Based on these submissions, a community may petition the Council for "substantive certification" which, if granted constitutes approval of the plan to satisfy the municipality's *Mt. Laurel* obligation. *N.J.S.A.* 52:27D-313. In order to ensure that a community will still be in a position to meet its fair share obligation at the conclusion of the substantive certification process, the Council is authorized to require a municipality to preserve its scarce resources, such as vacant land, that may be essential to satisfy its fair share housing obligation. *Hills Development, supra,* 103 *N.J.* at 61, 510 *A.*2d at 653.*

In May 1985 an exclusionary zoning lawsuit was filed against Cherry Hill in the State's trial court alleging that the township had failed to provide for its fair share of lower income housing. *Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill,* Docket No. L-042750-85 P.W. (Law Division, Superior Court). Pursuant to the Act and the *Hills Development* opinion, the case was transferred by the court to the Council, and Cherry Hill eventually applied for substantive certification in January 1987.

The Council determined in March 1987 that Cherry Hill's housing element and fair share plain had certain deficiencies, and the township was given 60 days to submit a corrected plan. The Council also determined that land was a scarce resource in Cherry Hill and, in an order dated April 24, 1987, the township was restrained by the Council from granting development approval for

---

* The authority to preserve scarce resources was later codified by the Council in its regulations. *N.J.A.C.* 5:91-11.1.

any vacant land of two or more acres until the Council acted on Cherry Hill's request for substantive certification. Relief from the restraining order was available in the form of exemptions. (Pa34-Pa37).* The purpose of the restraint was to ensure that scarce vacant land did not disappear while the administrative process was pending.

Fred. J. Tocco owns about 140 acres of vacant land in Cherry Hill, New Jersey. More than nine months after the Council's restraints on development were ordered, Tocco asked the Council on January 29, 1988 to grant him an exemption from the terms of the order. The Council denied the request because Tocco's land was suitable for lower income housing development and relief from the restraints at that time would therefore be inappropriate given the limited amount of vacant land available in Cherry Hill. Tocco did not appeal from this denial, nor did he later seek a more narrow or limited exemption from the order.

Ultimately, the administrative process proved unsuccessful. Although the Council conditionally granted Cherry Hill's petition for substantive certification in July 1988, the township failed to satisfy the conditions and the Council was forced to deny the petition in September 1988. The question of the township's failure to provide a realistic opportunity for its fair share of lower income housing was therefore remanded to the State trial court in accordance with *N.J.S.A.* 52:27D-314. However, the Council's restraints on land development were extended

---

* "Pa" refers to the appendix accompanying Tocco's petition. Cites below to "Pb" refer to the petition.

for 30 days to October 26, 1988 in order to preserve the status quo until the trial court could consider the case.*

In the meantime, on May 24, 1988, Tocco filed a complaint in the State's trial court alleging that the Council's restraints, which had been in effect at that time for little more than one year, constituted a temporary taking entitling him to compensation under the New Jersey and United States Constitutions (Pa48-Pa53). This claim was rejected by both the trial court and the State's Appellate Division, the intermediate appeals court in New Jersey. (Pa18-Pa47; Pa3-Pa17).

Holding that the Council's restraints did not amount to an unconstitutional taking under the State or federal constitution, the Appellate Division noted that Tocco did not challenge the Council's scarce resource regulation or the reasonableness of the moratorium or its duration. The State court also correctly observed, while weighing the private and public interests at stake, that Tocco was one of many landowners whose property may have been incidentally affected by the legitimate exercise of the State's police powers to preserve scarce resources.* (Pa11;

---

* On remand, the trial court restrained all development of land, including Tocco's property, in excess of 10 acres. However, Tocco was granted an exemption in April 1989 and was permitted to proceed through the township's preliminary and final approval process for 48 of his 140 acres on the condition that at least 42 lower income units were built on the site. Tocco was also allowed to apply for preliminary major subdivision approval on the remaining parcel. In March 1990 the trial court released an additional 8 acres to receive final approvals.

* Although noting this observation in his discussion of the State court's opinion (Pb20), Tocco inexplicably asserts as fact

(Continued on following page)

Pa14-Pa15). With respect to his claim that the freeze was nonetheless a temporary taking of his property, the court below applied the well-settled State law principle, interpreted consistently with parallel federal constitutional standards enunciated by this Court, that the imposition of a land development moratorium of limited duration for public interest reason does not constitute a temporary taking of a landowner's property (Pa15). Nor, said the court, does a taking result from a diminution in property values during governmental deliberations, absent extraordinary delay (Pa15-Pa16). Hence, the Court concluded that the Council's "land development moratorium imposed for the purpose of enabling a municipality to

---

(Continued from previous page)

at several places in this petition that he has been singled-out or that he was the only landowner affected the moratorium (Pb19; Pb23 to Pb24; Pb25). This misstatement could affect the Court's deliberations on the petition (*Sup.Ct.R.* 15.1) because one of the acknowledged purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 *U.S.* 40, 49 (1960). In weighing the private and public interests at stake, the benefits enjoyed by landowners as a result of the exercise of the police powers must be considered along with any burden occasioned by temporary fluctuations in property values. *Agins v. Tiburon*, 447 *U.S.* 255, 260-62 (1980). Here, in the context of land use regulation designed to promote the general welfare, landowners were not unfairly burdened by a temporary development moratorium since they also undoubtedly benefit as members of the community as a whole by enabling their township to attract housing for the workforce. See *Holmdel Builders Ass'n v. Twp. of Howell*, 121 *N.J.* 550, 562-66, 583 *A.*2d 277, 283-85 (1990); *Mt. Laurel II, supra*, 92 *N.J.* at 209-212 and n.5.

fulfill its [State] constitutional obligation to provide for its fair share of low and moderate income housing is not unconstitutional" (Pa17).

Tocco petitioned New Jersey's highest court for discretionary review of the intermediate appellate court's decision. In an order dated October 16, 1990, the State's Supreme Court denied the application without comment (Pa1-Pa2). Tocco filed a petition for *certiorari* with this Court on January 15, 1991.*

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The petition should be denied because the State court below merely applied the principle long-settled by this Court that reasonable land use regulation in the proper exercise of the police power does not constitute a taking. *Nectow v. Cambridge*, 327 *U.S.* 183 (1928).

2. Land use regulation amounts to an impermissible taking only in extreme circumstances, such as where it fails to promote a legitimate State interest or destroys a fundamental attribute of ownership. *United States v. Riverside Bayview Homes, Inc.*, 474 *U.S.* 121 (1985); *Kirby Forest Industries, Inc. v. United States*, 467 *U.S.* 1 (1984). Thus, even a substantial reduction in the value of property during governmental decisionmaking, absent extraordinary delay, is an incident of ownership and is not considered a

* The petition was returned to Tocco's counsel by the Clerk because of deficiencies. Corrected copies of the petition were received by the New Jersey Attorney General's office on January 30, 1991.

taking in the constitutional sense. *Agins v. Tiburon*, 447 *U.S.* 255 (1980); *Danforth v. United States*, 308 *U.S.* 271 (1939).

3. Consistent with these constitutional standards, the opinion below correctly concluded that any interference with Tocco's property interest caused by the 18-month development moratorium, imposed to promote the general welfare, was not severe enough to be considered a taking in the Fifth Amendment sense. Under State law, lower income housing and the opportunity to provide for it advances the public welfare and is a valid exercise of the State's police powers. *Hills Development, supra*, 103 *N.J.* at 19-26, 510 *A.*2d at 631-34; *Mt. Laurel I, supra*, 67 *N.J.* at 173-91, 336 *A.*2d at 924-34. There was no extraordinary delay in this case occasioned by the Council's review of Cherry Hill's petition for substantive certification and any fluctuation in property value during that time was merely an incident of ownership. In addition, Tocco presented no proof at all concerning the effect, if any, of the moratorium on property values. Moreover, he was not deprived of all use of his land since he did not pursue the kind of limited exemptions from the moratorium that were ultimately sought from and ordered by the trial court, to permit him to use his land in ways that would still preserve enough vacant land for lower income housing. *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104 (1978). Likewise, the moratorium did not interfere with his right to sell the land. *Kirby Forest Indus., supra*, 467 *U.S.* at 15.

4. It makes no difference that Tocco asserts a "temporary" rather than permanent taking. A temporary taking is not different in kind from a permanent taking. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 *U.S.* 304 (1987) (*First Lutheran Church*). Therefore, the analysis

does not differ depending on the permanency of the taking alleged. An effected landowner must still show, which Tocco did not and could not do, that the land use regulation at issue failed to advance legitimate State interests or destroyed fundamental ownership rights.

REASONS FOR DENYING THE PETITION

There are no special and important reasons why the Court should review this case. *Sup.Ct.R.* 10. The opinion below merely applied the well-established principle that reasonable land use regulation in the proper exercise of the police power does not constitute a taking. See, *e.g.*, *Nectow v. Cambridge*, *supra*, 327 *U.S.* at 188 (1928). Just such a case, and nothing more, is before the Court on this petition.

The Fifth Amendment guarantees that private property will not "be taken for public use, without just compensation."* However, there can be no doubt that government may implement laws or programs that adversely affect property and other economic values. *Penn Central Transp. Co.*, *supra*, 438 *U.S.* at 124-25.

---

* Although the State court below did not expressly rely on federal precedent in reaching its decision, the New Jersey Supreme Court has interpreted as coextensive the protections under both the New Jersey and United States Constitutions afforded a landowner against taking property without just compensation. *N.J. Const.* (1947), art. I, ¶20; *U.S. Const.* amends, 5, 14; *Littman v. Gimello*, 115 *N.J.* 154, 557 *A.*2d 314, 317-18, *cert.* denied ___ U.S. ___, 110 *S.Ct.* 324, 107 *L.Ed.*2d 314 (1989).

Government regulations affecting property values work a taking only if their application does not promote legitimate state interests or denies an owner economically viable use of his lands. *Agins, supra,* 447 *U.S.* at 260. Only in "extreme circumstances" will land use regulation amount to an impermissible taking of affected property. *United States v. Riverside Bayview Homes, Inc., supra,* 474 *U.S.* at 126. All the State court did was apply these settled standards of constitutional analysis to the particular circumstances of the taking claim before it.

The State court opinion at issue recognized that the land development freeze imposed by the Council advanced legitimate State interests. Under New Jersey law, providing lower income housing is a governmental end. *Holmdel Builders Ass'n, supra,* 121 *N.J.* at 567, 583 *A.*2d at 285. So too, government regulation designed to provide a realistic opportunity for lower income housing throughout the State promotes the general welfare and is a valid exercise of the State's police powers.* *Mt. Laurel* I, *supra,* 67 *N.J.* at 174-80, 336 *A.*2d at 713-17. The public welfare is similarly served when the Council exercises its regulatory power during the *Mt. Laurel* process to preserve scarce resources, such as vacant land, until it is determined if those resources will be needed to satisfy a municipality's fair share obligation. *Hills Development, supra,* 103 *N.J.* at 61-62, 510 *A.*2d at 653.

---

* Housing needs have been recognized by this Court as clearly related to the general welfare. *Berman v. Parker,* 348 *U.S.* 26, 33 (1954).

Indeed, Tocco does not question the Council's authority to preserve scarce resources or the reasonableness of the restraints on land development imposed in this case against Cherry Hill in the proper exercise of the State's police power. (Pall; Pb9 to Pb10). Hence, it was not surprising, and no new constitutional ground was broken, when the opinion below concluded that a development moratorium of limited duration imposed for public interest reasons, during governmental deliberations and to enable compliance with a State constitutional mandate did not result in the temporary taking of an affected landowner's property. Certainly, this mundane application of clearly established takings law does not merit review by this Court.

Likewise, there was nothing remarkable about the State court's recognition that there were no extreme circumstances in this case giving rise to a regulatory taking. Apart from the fact that the land use regulation at issue advanced legitimate State interests during governmental deliberations, there can be no taking unless an owner is deprived of economically viable use of his land. *Agins, supra,* 447 *U.S.* at 260. No such showing was made in this case. Moreover, it is an incontrovertible axiom of takings law that changes in value, even had they been demonstrated here, are incidents of ownership and "cannot be considered as a taking in the constitutional sense." *Danforth v. United States, supra,* 308 *U.S.* at 285.

Along similar lines, fluctuations in the value of property during the process of governmental decisionmaking, in the absence of extraordinary delay, are incidents of ownership and do not work a taking. *Agins, supra,* 447 *U.S.* at 263. Even a substantial reduction in property

value does not result in a taking, absent an interference with the owner's legal right to sell his land. *Kirby Forest Indus., supra,* 467 *U.S.* at 15. Thus, only land use regulations that extinguish a "fundamental attribute of ownership" amount to a taking and entitle a landowner to compensation. *Id.* at 262. In holding that no unconstitutional taking occurred in this case, the court below merely concluded, consistent with these standards, that any interference with Tocco's property interests caused by the 18-month development freeze was not severe enough to be considered a taking in the constitutional sense.

Here, the State court assumed for purposes of its analysis that there may have been some diminution in the value of Tocco's property, but concluded nevertheless that the 18-month moratorium was reasonable given the cumbersome nature of the Council's administrative process. As the trial court had also observed (Pa39 to Pa40), it was not surprising that the moratorium was in effect for 18 months, the corresponding period of time between the dates of Cherry Hill's application for and the denial of substantive certification. In that regard, even Tocco conceded the reasonableness of the moratorium. Moreover, the length of time involved here was well within acknowledged expectations of how long the decisionmaking process may last. See *Hills Development, supra,* 103 *N.J.* at 39, 510 *A.*2d at 641-42. Consequently, there was no extraordinary delay in the constitutional sense occasioned by the Council's deliberations and, as the State court correctly noted, any fluctuation in property value during that time was an incident of ownership for which

no compensation was required.* (Pa15 to Pa17). This unremarkable and appropriate application of constitutional takings law to the circumstances of this case clearly does not require further review by this Court.

Nevertheless, Tocco claims in his petition that the development moratorium in fact denied him all use of his property. Each case must be examined on its particular facts to determine if government action has worked a taking. See *e.g., Kaiser Aetna v. United States*, 444 *U.S.* 164, 175 (1979); *Penn Central Transp. Co., supra*, 438 *U.S.* at 124 (ad hoc, factual inquiries); *United States v. Central Eureka Mining Co.*, 357 *U.S.* 155, 168 (1958) (question turns upon the particular circumstances of each case). A taking claim is premature, however, until use of an owner's land is actually forbidden. See, *e.g., Williamson Cty. Regional Planning v. Hamilton Bank*, 473 *U.S.* 172, 186-88 (1985). For example, in *Penn Central*, the Court held that a challenge to the application of New York City's Landmarks Preservation Law was not ripe because, although the responsible administrative body had denied a plan for a 50-story office building, the property owners had "not sought approval for a smaller structure." *Penn Central Transp. Co.*, 438 *U.S.* at 137. As a result, the Court was uncertain whether the administrative body would deny all economically

---

* Significantly, there was no evidence whatsoever in the record below concerning the effect, if any, that the 18-month moratorium had on the value of Tocco's land. For this reason, there is no way to evaluate the economic impact caused by the moratorium. *Penn Central Transp. Co., supra*, 438 *U.S.* at 124. Therefore, the Court should assume Tocco's land could be put to reasonable use. See *Goldblatt v. Hempstead*, 369 *U.S.* 590, 594-96 (1962).

viable uses of the property and, consequently, if the property had in fact been taken in the constitutional sense. 438 *U.S.* at 136-37.

Likewise, in the present case, although he applied for and was denied an exemption from the moratorium, Tocco never asked the Council if it would allow him to build lower income housing.* Nor did he pursue limited exemptions to permit him to develop small portions of his land, relief the trial court here eventually allowed on remand from the Council. See, *e.g., Andrus v. Allard*, 444 *U.S.* 51, 65-66 (1979). Moreover, there is no evidence in this case that the moratorium interfered with Tocco's right to sell or otherwise dispose of his land. *Kirby Forest Indus., supra*, 467 *U.S.* at 15; *Agins, supra*, 447 *U.S.* at 262. In these circumstances, a development moratorium imposed to promote legitimate State interests that does not deprive a landowner of a fundamental attribute of ownership or economically viable use of his property cannot be considered a taking entitling him to compensation. Therefore, the opinion below is correct and presents no special and important reasons supporting further consideration by this Court.

This conclusion is not altered because Tocco asserts a "temporary" rather than a permanent taking. A temporary taking, which denies a landowner all use of his property, is not different in kind from a permanent taking. *First Lutheran Church, supra*, 482 *U.S.* at 318. Thus, the analysis used to determine if a taking – temporary or

---

* It is inconceivable that the Council would interpret the restraints it imposed on the township to preclude the very use they were designed to preserve.

permanent – has occurred in the first instance does not differ depending on the permanency of taking alleged. The threshold question in both situations is whether the governmental regulation advances a legitimate State interest or deprives an owner of economically viable use of his land. *Agins, supra,* 447 *U.S.* at 260. Here, applying these established rules of constitutional analysis, the State court below concluded that the moratorium had not worked a taking, temporary or otherwise.

For like reasons, this case does not present the Court with "a great opportunity" (Pb15) to declare for the first time when a temporary taking occurs under federal law. Contrary to Tocco's assertion, there is nothing in *First Lutheran Church* to suggest that the Court was anxious to, but could not or chose on the record before it not to, devise a temporary taking test that departed from the settled criteria applicable to a permanent taking. See *e.g., Agins, supra,* 447 *U.S.* at 260. Rather, having assumed there was a taking, *First Lutheran Church* was limited to resolving what remedies were available to a landowner when government action had *already* resulted in a temporary taking. *Id.*, 482 *U.S.* at 322. Since no pertinent question was left open, there is no reason to revisit *First Lutheran Church* in this context.

Tocco's remaining argument is so absurd that it deserves only a brief response. He urges the Court to grant his petition on the ground that the New Jersey courts were "unsuited" to hear this case (Pb19; Pb16 to Pb24). Having declared in the first instance the constitutional obligation of communities to provide their fair share of lower income housing, the argument goes, the State courts cannot fairly decide a challenge to regulatory

actions designed to further the goals established in the *Mt. Laurel* cases. This argument must be rejected as just a desperate attempt by this unhappy litigant to divert the Court's attention from his insubstantial takings claim.

First, the trial court's decision on remand from the Council to continue the development freeze, contrary to Tocco's claim at pages 19 and 20 of his petition, serves to underscore rather than undercut the propriety and reasonableness of the Council's original development restraints. Second, there is no "conflict" (Pb22 to Pb24) between this Court's decision in *Nollan v. California Coastal Com'n*, 483 *U.S.* 825 (1987), and the New Jersey Supreme Court's decision in *Holmdel Builders Ass'n* because no takings claim was decided in that State court opinion. Moreover, even if a conflict existed between the two cited opinions, there is no conflict between *Nollan* and the Appellate Division decision below. Thus, the asserted conflict has nothing to do with this case and does not support this Court's exercise of discretionary review over the *Tocco* matter. See *Sup.Ct.R.* 10.1(c).

Finally, Tocco argues (Pb21) that the State's highest court, in declining to review this case, ignored allegedly controlling precedent in *Lomarch v. Englewood*, 51 *N.J.* 108, 237 *A.*2d 881 (1968). This argument is utterly meritless because *Lomarch* has no application to the present case. The one-year land development freeze invalidated in *Lomarch* affected only one landowner and it was not imposed to advance governmental interests in the exercise of the police powers. Instead, the freeze was designed solely to give the city more time to decide if it

wanted to buy the property subject to the freeze. Conversely, it is undisputed here that the development moratorium was imposed in the proper exercise of the State's police powers to preserve all scarce vacant land resources in Cherry Hill while the township's *Mt. Laurel* obligation was being reviewed by the Council. *Lomarch* is therefore inapplicable to this case, and the State courts properly chose not to consider it either instructive, persuasive or controlling.*

In conclusion, the State court opinion at issue applied well-established principles of takings law to the circumstances of this case and correctly concluded that the 18-month land development moratorium imposed to enable a municipality to satisfy its obligation under the State constitution to provide for its fair share of lower income housing did not work an unconstitutional temporary taking of Tocco's land. This unremarkable conclusion presents no special and important reason requiring further review by this Court and Tocco's petition for a writ of *certiorari* should therefore be denied.

---

* Obviously, the New Jersey Supreme Court, which authored the opinion, was not troubled by any purported conflict between *Lomarch* and the Appellate Division's decision in this case since it declined to review the decision.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Respondent
New Jersey Council on
Affordable Housing

MARY C. JACOBSON
Deputy Attorney General
Counsel of Record

TODD A. WIDGER
Deputy Attorney General
On the Brief

Dated: February 28, 1991